BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BARBARA E. CLARK	)	
Claimant	)	
VS.	)	
	)	Docket No. 166,431
FOOD BARN	)	
Respondent	)	
AND	)	
	)	
CREDIT GENERAL INSURANCE CO.	)	
Insurance Carrier	)	
AND	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

The respondent and insurance carrier request review of the July 13, 1995 Order of Administrative Law Judge John D. Clark entered in claimant's post-award request for penalties. The Appeals Board heard oral argument on November 14, 1995.

APPEARANCES

Claimant appeared by her attorney, James P. Johnston of Wichita, Kansas. The respondent and its insurance carrier appeared by their attorney, Eric T. Lanham of Kansas City, Kansas. The Workers Compensation Fund appeared by its attorney, Eric R. Yost of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board considered the official file of the Division of Workers Compensation. The stipulations of the parties are set forth in the Award of the Administrative Law Judge dated July 18, 1994.

ISSUES

The Administrative Law Judge entered an Award in this proceeding on July 18, 1994, granting claimant permanent partial disability benefits. Claimant served Demand for Payment of Benefits upon respondent on May 3, 1995. When the respondent and insurance carrier failed to make payment, the claimant sought penalties. By Order dated July 13, 1995, the Administrative Law Judge ordered penalties. The respondent and insurance carrier paid the penalties ordered and sought this review. In their Request for Board Review, the respondent and insurance carrier requested review of two (2) specific issues:

(1) Whether the Administrative Law Judge exceeded his authority in ordering penalties; and
(2) Whether permanent partial disability benefits are due claimant thirty (30) days following oral argument to the Appeals Board if the Appeals Board has not rendered its final order.

Because the respondent and insurance carrier paid the penalties ordered by the Judge, the claimant filed a motion to dismiss this review and contends the issue is now moot.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds:

The claimant's Motion to Dismiss this review should be granted.

The respondent and insurance carrier had the right to withhold payment of the penalties pending review of the July 13, 1995 Order. Payment of the penalties is acquiescence to the Order and the respondent and insurance carrier may not, thereafter, adopt an inconsistent position and request a review of that Order. See Labette Community College and Kansas State Board of Education v. Board of County Commissioners of Crawford County and Crysti Orender,___ Kan.___, Docket #72,062, syl. 2, Dec. 8, 1995, McDaniel v. Jones, 235 Kan. 93, 679 P.2d 682 (1984), and Brown v. Combined Ins. Co. of America, 226 Kan. 223, 597 P.2d 1080 (1979).

Respondent and its insurance carrier argue they did not acquiesce in the Order for Penalties and would be entitled under K.S.A. 44-525 to reduce the amount of disability compensation due and owing claimant to the extent the penalties were wrongly assessed. The Appeals Board disagrees. Although K.S.A. 44-525 does provide a credit for amounts

paid by an employer to an employee before an award, the credit is specifically limited to payments of compensation. Overpayment of penalty does not qualify for a credit under this statute.

The above finding disposes of this review and renders the other issues moot.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that this review should be, and hereby is, dismissed; that the Order of Administrative Law Judge John D. Clark entered in this proceeding on July 13, 1995, remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of December 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James P. Johnson, Wichita, Kansas
Eric T. Lanham, Kansas City, Kansas
Eric R. Yost, Wichita, Kansas
John D. Clark, Administrative Law Judge
Philip S. Harness, Director

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CREDIT GENERAL INSURANCE CO.	)	
Insurance Carrier	)	
AND	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

Claimant requests review of Administrative Law Judge John D. Clark's Award entered in this proceeding on July 18, 1994.

APPEARANCES

Claimant appeared by her attorney, James P. Johnston of Wichita, Kansas. The respondent and its insurance carrier appeared by their attorney, Steven A. McManus of Kansas City, Kansas. The Workers Compensation Fund appeared by its attorney, Kendall R. Cunningham of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record considered by the Appeals Board as well as the stipulations of the parties are contained in the Award of the Administrative Law Judge.

ISSUES

Because the Administrative Law Judge found claimant exerted minimal effort in attempting to return to work for the respondent in accommodated employment, paying a comparable wage, the Judge awarded claimant permanent partial disability benefits based

upon an eleven percent (11%) functional impairment rating to the body. The Judge denied respondent's request to assess liability against the Workers Compensation Fund. Claimant requests review of the issue of the nature and extent of disability and the respondent requests review of the issue of Workers Compensation Fund liability. Those are the two (2) issues now before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the briefs of the parties, the Appeals Board finds as follows:

The Award of the Administrative Law Judge should be modified. Claimant is entitled to permanent partial general disability benefits based upon a seventeen percent (17%) work disability.

(1) Claimant has worked as a grocery checker most of her adult life. In April 1987, claimant began working at one of respondent's grocery stores in Wichita, Kansas. In the late 1980's, claimant began to experience constant pain in her right thumb. Over a period of years, pain and numbness spread to three (3) of claimant's right fingers, her right arm, right shoulder and neck. Despite her increasing symptoms, claimant continued to work until March 1992, when she could no longer tolerate the pain. The parties stipulated that claimant's date of accident for purposes of this proceeding is March 25, 1992.

Although claimant's medical history after 1987 is somewhat unclear, it appears in the late 1980's claimant consulted with her family physician regarding her right upper extremity symptoms and later saw a chiropractor. In March 1992, claimant officially reported her injury to her store manager at her union representative's suggestion. Respondent then referred claimant to the company physician who referred her on to orthopedic surgeon, Harry Morris, M.D.

Dr. Morris saw claimant between April 22 and July 29, 1992. He diagnosed carpometacarpal (CMC) joint arthritis of the right thumb, stage 3, and impingement syndrome of the right shoulder. He believes claimant has sustained a ten percent (10%) functional impairment to the body as a whole as a result of her work-related injuries. Based upon a functional capacity evaluation, he believes claimant should observe permanent work restrictions. Dr. Morris testified claimant should be restricted from forceful and highly repetitive activities, hand-intensive type work, lifting more than twenty (20) pounds, frequently lifting or carrying more than ten (10) pounds, lifting more than thirteen (13) pounds overhead on an occasional basis, and lifting more than eight (8) pounds overhead on a frequent basis. Although Dr. Morris believes that claimant could perform a job requiring occasional reaching, claimant would not be able to tolerate a job requiring repetitive reaching and grasping for an eight (8) hour day. Dr. Morris considers claimant a credible and honest patient.

Frederick Wolfe, M.D., a physician specializing in rheumatology, examined claimant in July 1992 at Dr. Morris' request. Dr. Wolfe found claimant had CMC joint arthritis and rotator cuff tendinitis in the right shoulder. He testified claimant is capable of a number of other employment tasks, but not those of a grocery checker. Dr. Wolfe also found claimant credible. Both Drs. Wolfe and Morris believe claimant could perform many tasks using her left hand.

Orthopedic surgeon, J. Mark Melhorn, M.D., saw claimant on two (2) occasions, September 10, 1992 and March 26, 1993. Dr. Melhorn diagnosed CMC osteoarthritis of the thumb joint, painful right upper extremity, hand, and right shoulder impingement. He believes claimant has sustained an eight percent (8%) functional impairment to the body as a whole as a result of her work-related injuries. However, if he included certain subjective complaints, claimant's functional impairment rating to the body would be fourteen percent (14%). Although Dr. Melhorn thought claimant's complaints appeared greater than the clinical exam would indicate, he does believe claimant should be limited to light work as defined by OSHA. He believes claimant could perform a job requiring a maximum lift of thirteen (13) pounds occasionally from floor to chest level, and that she could carry thirteen (13) pounds for fifty feet on an occasional basis, and occasionally handle money and receipts. Also, he agrees that claimant should be restricted from forceful and highly repetitive activities as well as hand-intensive type work, and that these restrictions should apply to both upper extremities.

Based upon the medical evidence provided, the Administrative Law Judge found claimant sustained an eleven percent (11%) functional impairment to the body as a whole. The Appeals Board adopts that finding as its own as it appears reasonable in light of all the evidence and within the range of eight to fourteen percent (8-14%), the highest and lowest ratings provided by the medical experts.

After a period of treatment from Dr. Morris, in August 1992 claimant attempted to return to work for respondent as a checker and stocker but left after experiencing increased symptoms. In September 1992 claimant returned to work for respondent in the customer service booth where she sold Lottery tickets, performed record-keeping duties, and other tasks involving handling money and using a calculator. After two or three hours performing this job, claimant left work complaining of increased pain. When discussing her case with her vocational rehabilitation expert, James Molski, claimant told him that reaching across the customer service booth counter to deal with customers hurt her arm. This job paid nine dollars ($9.00) per hour, the same rate claimant was earning on the date of her accident on March 1992.

Both claimant and respondent presented the testimony of vocational rehabilitation consultants. Claimant's witness, James Molski, testified that claimant has lost thirty-five to forty percent (35-40%) of her ability to perform work in the open labor market, based upon the restrictions of Dr. Morris. He also testified he felt Dr. Melhorn's restrictions were very similar to Dr. Morris' and that Dr. Melhorn also limited claimant to light work. Respondent's witness, Gary Gammon, testified that claimant had lost those jobs classified as medium physical labor according to the Dictionary of Occupational Titles (DOT), and

believes claimant has lost no more than twenty-nine and two hundredths percent (29.02%) of her ability to perform work in the open labor market based upon the restrictions of both Drs. Morris and Melhorn.

Regarding loss of ability to earn a comparable wage, Mr. Molski testified claimant would probably be looking at jobs in the five dollars ($5.00) per hour range from other employers if she did not return to work for the respondent. Mr. Gammon testified claimant had not lost the ability to earn a comparable wage because claimant should be able to perform the customer service booth position. Respondent contends claimant should be limited to permanent partial disability benefits based on functional impairment only because she wrongfully refused to return to work for the respondent and perform a job within her work restrictions and limitations that would pay a comparable wage. Claimant contends she has a significant work disability because she can no longer work as a grocery checker nor perform the job in the customer booth. A video tape of the customer service booth position was provided but provides little assistance because it is of such a short duration and fails to provide an adequate representation of the actual job or the physical activities required. However, based upon the entire record, including the testimony of the physicians and both vocational rehabilitation experts, the Appeals Board finds the customer service booth position is one the claimant should be able to perform without violating her work restrictions. Although claimant contends the job requires reaching across a counter, which increases her pain, there appears to be no reason that claimant could not perform this job by using her left arm to a greater extent. It does not appear the job would violate claimant's restrictions against forceful, highly repetitious, or hand-intensive activities, nor would it violate the weight-lifting restrictions of those concerning overhead work. Also, it is apparent that respondent would have to accommodate claimant in this position by guarding closely against using claimant as a checker during busy times of the day. The record is unclear whether the accommodated job offered to claimant would require her to check with the right hand. However, the evidence is uncontroverted that respondent had a checkstand to accommodate someone checking with the left hand.

Because hers is a non-scheduled injury, claimant's right to permanent partial disability benefits is governed by K.S.A. 1991 Supp. 44-510e. That statute provides:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The Appeals Board finds the rationale of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), applies to the factual

situation at hand. In the Foulk decision the Kansas Court of Appeals ruled that the presumption of no work disability should apply when a claimant rejects offered employment at comparable wage which the claimant has the ability to perform. In so holding, the Court of Appeals found that the legislature did not intend for a worker to receive work disability where the worker was still capable of earning nearly the same wage. The Appeals Board finds claimant made a marginal attempt to perform the work in the customer service booth where she could work without violating her work restrictions and earn a comparable wage.

Although the presumption of no work disability applies, this does not mean that the presumption may not be overcome. In this case, although the accommodated job offered by the respondent would pay claimant a wage comparable to the average weekly wage she was earning before her injury, this does not mean the claimant is capable of earning a comparable wage in the open labor market. Prior to her accident, claimant had no medical restrictions and was working full-time. After her accident, claimant is restricted to such extent she is unable to work as a grocery checker, the occupation she has performed most of her adult life. In this case, the Appeals Board finds the evidence establishes that claimant has overcome the presumption of no work disability as contained in K.S.A. 1991 Supp. 44-510e.

As required by K.S.A. 1991 Supp. 44-510e, the trier of fact must consider both loss of access to the open labor market and loss of ability to earn a comparable wage to determine work disability. A fundamental goal of the Kansas Workers Compensation Act is to return an injured worker to gainful employment whenever possible. Employers are encouraged to accommodate injured and handicapped employees so as to accomplish this goal. Recognition should be given to the employer's offer of a comparable wage job and claimant's marginal attempt to perform that job. Accordingly, the Appeals Board will impute the comparable wage which the claimant would have earned had she accepted the respondent's offer of an accommodated position to find that she has no wage loss for purposes of that prong of the two-part work disability test of K.S.A. 1991 Supp. 44-510e(a) which pertains to loss of ability to earn a comparable wage.

Regarding the second prong of the work disability test, the Appeals Board averages the percentages provided by the vocational rehabilitation counsellors and finds that claimant has lost approximately thirty-three percent (33%) of her ability to perform work in the open labor market. Based upon her permanent work restrictions, claimant has lost the ability to perform most, if not all, of the jobs classified as medium physical labor by the DOT and those light and sedentary jobs that require repetitive or intensive hand movement. The Appeals Board finds thirty-three percent (33%) approximates the percentage of loss of those occupations claimant is no longer able to perform as a result of her work-related injuries.

Although not required to do so, the Appeals Board finds no compelling reason to give one prong of the work disability test greater weight than the other. Therefore, equal weight is given both prongs of the test and the zero percent (0%) loss of ability to earn a comparable wage is averaged with the thirty-three percent (33%) loss of ability to perform work in the open labor market to yield a work disability of seventeen percent (17%) which

the Appeals Board finds to be an appropriate basis to award permanent partial disability benefits in this case.

(2) The Workers Compensation Fund has no liability in this proceeding. The Appeals Board finds respondent did not have knowledge that claimant had an impairment that constituted a handicap before she reported her injury to her manager in March 1992.

It is well settled that the respondent must prove that it either hired or retained claimant in its employment with knowledge that claimant possessed an impairment of such magnitude that it constituted a handicap. The Workers Compensation Act defines "handicap" as an impairment of such character that it impairs ones ability to obtain or retain employment. See K.S.A. 1991 Supp. 44-566 and K.S.A. 1991 Supp. 44-567.

Although claimant's manager may have known claimant was experiencing some symptoms prior to March 1992, that knowledge does not rise to the level of knowledge of a handicap that affected claimant's ability to obtain or retain employment. Before claimant reported her injury to her manager in 1992, it appears claimant did not miss work as a result of her increasing symptomatology nor report to her manager that her ability to perform her job had been affected. Additionally, it appears claimant had no work restrictions or limitations before she left work in March 1992.

Although respondent is not required to prove mental reservation, mere knowledge of minor symptomatology or a prior injury is not sufficient, in and of itself, to establish that an individual possesses an impairment of such character or magnitude as to constitute a handicap in obtaining or retaining employment. See Johnson v. Kansas Neurological Institute, 240 Kan. 123, 727 P.2d 912 (1986) and Carter v. Kansas Gas & Electric Co., 5 Kan. App. 2d 602, 621 P.2d 448 (1980). Before liability can be shifted to the Workers Compensation Fund, respondent is required to show that the claimant had an impairment rising to the level of a handicap and that respondent knew about it. Because that was not done, the Workers Compensation Fund has no liability in this proceeding.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board the Award of Administrative Law Judge John D. Clark, dated July 18, 1994, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR OF the claimant, Barbara E. Clark, and against the respondent, Food Barn, and its insurance carrier, Credit General Insurance, for an accidental injury sustained on March 25, 1992, and based upon an average weekly wage of $434.98, for 15 weeks temporary total disability compensation at the rate of $289.00 per week or $4,335.00, followed by 400 weeks at the rate of $49.30

per week or $19,720.00 for a 17% permanent partial general disability making a total award of $24,055.00.

As of December 15, 1995, there is due and owing claimant 15 weeks of temporary total disability compensation at the rate of $289.00 per week or $4,335.00, followed by 179.29 weeks of permanent partial disability compensation at the rate of $49.30 per week in the sum of $8,839.00, for a total of $13,174.00 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $10,881.00 is to be paid for 220.71 weeks at the rate of $49.30 per week, until fully paid or further order of the Director.

The remaining orders of the Administrative Law Judge are hereby adopted by the Appeals Board as if same were fully set forth herein.

IT IS SO ORDERED.

Dated this ____ day of December 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James P. Johnston, Wichita, Kansas
Stephen A. McManus, Kansas City, Kansas
Kendall R. Cunningham, Wichita, Kansas
John D. Clark, Administrative Law Judge
Philip S. Harness, Director